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Before the
Federal Communications Commission
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of

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DA 01-333

)

Amendment of Section 73.202(b),
Table of Allotments, FM Broadcast Stations
(Anniston and Ashland, AL, College Park,
Covington, and Milledgeville, Georgia

)

MM Docket No. 98-112

)

RM-9027

)

RM-9268

)

RM-9384

To: Mass Media Bureau

**REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION
AND REQUEST FOR PROTECTION**

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TABLE OF CONTENTS

Procedural Matters	1
The Commission Should Not Adopt WNNX's Proposed Order	2
Examination of the Earlier WHMA Relocation Case Is Important	4
WNNX's Case Discussion is Incomplete and Adds Nothing of Interest	6
The Critical Issue is Interdependence, Not Community Status	8

Preston W. Small (Mr. Small), by his attorney, hereby replies to WNNX LICO, Inc.'s (WNNX) May 21, 2001 *Opposition to Petition for Reconsideration (Opposition)*. In reply thereto, the following is respectfully submitted:

Procedural Matters

1) WNNX raises several procedural arguments, and seeks summary dismissal of the *Petition for Reconsideration, Opposition*, at 5, in the hopes that discussion of the substance of the case can be avoided. WNNX's procedural objections are easily denied.¹ WNNX's procedural objections generally state that "nothing in Small's Recon. Petition II raises any new questions of law or facts that have not already been thoroughly discussed and disposed of by the Commission." *Opposition*, at 2. WNNX fails to comment upon the fact that the February 9, 2001 *MO&O* responds for the first time to various arguments Mr. Small raised in his *Comments* and *Reply Comments* which were filed

¹ WNNX does not object to, or comment upon, Mr. Small's concern that the rules are unclear with regard to whether the denial of Mr. Small's June 16, 2000 *Petition for Reconsideration*, DA-01-333 (released February 9, 2001) would be published in the Federal Register. Nor does WNNX comment upon the fact that Mr. Small was required to file a petition for reconsideration on March 12, 2001, the first business day which occurred 30 days after February 9, 2001, in order to protect his procedural rights because, at that time, the Commission had not yet published DA 01-333 in the Federal Register and it was not clear whether such publication was required under the rules. Because WNNX does not object to Mr. Small's manner of filing, and because WNNX has filed an opposition, the Commission should resolve this matter in Mr. Small's favor and consider the merits of the various arguments raised by the parties. The Commission caused Federal Register publication of the *MO&O* on March 14, 2001, 66 Fed. Reg. 14862, and publication of Mr. Small's two petitions for reconsideration on May 4, 2001, 66 Fed. Reg. 22555. On March 12 Mr. Small was in a position of either filing a petition for reconsideration and risk being premature, or waiting to file the petition and risk that Federal Register publication would not occur thereby waiving appeal rights. Fortunately, Mr. Small filings were able to protect his filing rights, however, the Commission's interest is in receiving comments and the public should not be required to proceed under unclear filing rules where a wrong move could cause a pleading to be dismissed. Mr. Small suggests that the Commission should consider clarifying its rules to regarding publication of orders on reconsideration or consider putting publication information in the rule making document. Please note that references to Mr. Small's *Petition* made herein shall refer to Mr. Small's March 30, 2001 *Petition for Reconsideration and Request for Protection*.

prior to the release of the *Report and Order (Allocation Order)*, 15 FCC Rcd. 9971 (Alloc. Br. 2000), and WNNX fails to comment upon the fact that the *MO&O* modifies the *Allocation Order* by including new factual and legal discussion and that § 1.429(i) permits subsequent reconsideration when the original order is modified. *Cf.* 47 C.F.R. § 1.106(d)(2) (“the petition may request that additional findings of fact and conclusions of law be made.”). *Petition*, at 2-4.

2) Mr. Small requested alternatively that if the Commission considered the pleading repetitious, despite the fact that the February 9, 2001 *MO&O* was the first time that the Commission addressed arguments Mr. Small submitted in the rulemaking proceeding, and despite the fact that significant factual and legal issues still have not been addressed by the staff, that the pleading be considered as an application for review with leave to file any conforming papers the Commission might deem necessary “to ensure that the material reviewed by the Commission is complete.” *Petition*, at 4 n. 3. WNNX argues that if Mr. Small’s *Petition* is considered as an application for review, the pleading would be defective for failing “to concisely and plainly state the questions presented for review with reference to findings of facts or conclusions of law.” *Opposition*, at 4. WNNX fails to explain why the Summary contained in Mr. Small’s *Petition* does not “concisely and plainly state the questions presented for review.” Moreover, the substantive portion of Mr. Small’s *Petition* is thirty-three paragraphs long and the *Petition* is replete with references “to findings of facts or conclusions of law,” none of which WNNX takes the time to comment upon.

The Commission Should Not Adopt WNNX’s Proposed Order

3) It is respectfully submitted that the Commission should not adopt the draft order attached to WNNX’s *Opposition* because adoption of that proposed order would make for an incomplete record for review by the court of appeals. For instance, and without intending to include all of the substantial issues raised in the *Petition*, the court of appeals would have no Commission reasoning

concerning a) why the Commission did not consider the first effort to relocate Station WHMA-FM from Anniston to Sandy Springs in connection with the argument that WNNX's College Park proposal is merely a technical manipulation of the rules *Petition*, at ¶ 4-6 ; b) why the Commission did not consider the first effort to relocate Station WHMA-FM from Anniston to Sandy Springs as relevant allocation precedent even without regard to the technical manipulation argument, *Petition*, at ¶¶ 5, 7-11; c) whether the *Tuck* factors are weighted, *Petition*, at ¶ 12; d) how various of the *Tuck* factors, such as perceptions, elected officials, telephone directory, and zip codes, *Petition*, at ¶ 23, and zoning, building, and plumbing codes, *Petition*, at n. 13, demonstrate interdependence between two communities; e) how College Park and Atlanta can be considered economically intertwined for licensing purposes in numerous other radio services, but those economic somehow become irrelevant when broadcasting is at issue, *Petition*, at ¶ 24; f) why the Atlanta-Hartsfield Airport, which is located in College Park, may be ignored in assessing interdependence, especially where WNNX's initial *Petition for Rulemaking* touted the airport as a "most visible sign" of College Park's purported independence, at least until WNNX learned that College Park did not own the airport, *Petition*, at ¶ 13; g) why the Commission can exclude consideration of the Atlanta-Hartsfield Airport merely because no one resides there, while citing other businesses as showing College Park's purported independence, even though no one lives at those businesses, *Petition*, at ¶ 32-33; and h) why the Commission can ignore WNNX's claim that people from College Park constitute the substantial work force at the City of Atlanta's Airport, *Petition*, at ¶ 33.

4) WNNX's draft order, if adopted, would leave all of these issues unexplained by the Commission when the case is appealed and it is respectfully submitted that failure to discuss each of these issues amounts to a failure to engage in reasoned decision making. While WNNX appears

willing to proceed further on an incomplete record, Mr. Small is not, and the Commission, no doubt, does not want an incomplete record in this case.

Examination of the Earlier WHMA Relocation Case Is Important

5) WNNX argues that the earlier proposal to relocate Station WHMA-FM to Sandy Springs, just north of Atlanta, does not need to be considered because “the instant proposal for College Park stands on its own facts. The previous request has no legal or factual bearing on the instant proceeding.” *Opposition*, at 4. Again, WNNX’s preference is to ignore facts rather than explain them. First, examination of the first Station WHMA relocation proposal is warranted because it concerns a rulemaking to move a station to the Atlanta urbanized area. The *Allocation Order* and the *MO&O* discuss other allocation cases, but the Commission fails to “explain why these other cases shed more light on a proposed relocation of Station WHMA to the Atlanta Urbanized Area” than does the *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd. 6580 (1991), *app. for rev dismissed*, 12 FCC Rcd. 8392 (1997), *app. for rev. dismissed* 13 FCC Rcd 2104 (1998). *Petition*, at ¶ 5. WNNX does not explain why *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama* should be ignored, it is precedent which concerns the very urbanized area at issue in this case and it is therefore a highly relevant.

6) Among other facts, WNNX’s transmitter is located within the central city of Atlanta, WNNX’s signal 70 dBu contour covers the entire City of Atlanta, 77.7% of WNNX’s proposed 70 dBu contour lies within the Atlanta Urbanized area, *Petition*, at 8 n. 7, and 60.4% of College Park is owned by the City of Atlanta. *Petition*, at ¶ 11. The *Petition*, at ¶ 7, states that the Commission has determined that

With respect to signal population coverage, Emerald proposes to locate the antenna for its wide area Class C1 station in the city of Atlanta. Therefore, Emerald has an extremely weak case under this factor for the award of a first local service preference.

Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama, 6 FCC Rcd. at 6584 ¶ 24. Moreover, the Commission has determined that relocation to the Atlanta Urbanized Area does not support an award of a first local service preference where “Sandy Springs is directly adjacent to the city of Atlanta” and that “Sandy Springs is approximately one sixth [16.7%] the size of Atlanta in population.” *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd. at 6584 ¶ 25. College Park is adjacent to, and is substantially owned by, the City of Atlanta and College Park’s population is one twentieth (5.0%) of that of the City of Atlanta’s. *Petition*, at ¶ 11. Certainly the findings in the *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama* case are relevant instantly. Not only is College Park much smaller than Sandy Springs, the City of Atlanta owns 60.4% of College Park.²

7) Second, because the Commission is interested in assuring that its allocation rules are not subjected to technical manipulation, and because WNNX’s proposal is the second proposal which seeks to move Station WHMA to the Atlanta urbanized area, examination of *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville* is necessary to discern whether WNNX’s College Park proposal is merely a manipulation of the rules to serve the Atlanta market. *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville* determines that the proposed relocation of WHMA to Sandy Springs was an impermissible relocation to the Atlanta Urbanized Area. WNNX’s proposal is the second attempt to relocate Station WHMA to the Atlanta Urbanized Area and the Commission needs to explain why this second relocation attempt is not just a technical manipulation of the

² As in the *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama* case, the Commission must conclude that WNNX’s proposal is extremely weak and does not support the award “under Priority (3) as first local service to College Park,” contrary to the ruling made in the *Allocation Order* at ¶ 5. Because Mr. Small’s proposal at Social Circle would provide a first local service, *see* Mr. Small’s August 31, 1998 *Comments*, at ¶ 30, Mr. Small prevails under the Commission’s allocation criteria.

allocation rules to relocate to an urbanized area which was previously denied. WNNX's *Petition for Rulemaking*, at 3, plainly states that it preferred a favorable ruling in the earlier proceeding, but that it offers the College Park proposal as a "less controversial proposal for WHMA which complies fully with the Commission's technical rules and policies" If WNNX's proposal is not a "technical manipulation of the rules," even though WNNX itself states that the purpose for its rulemaking is to replace the earlier filed and denied Sandy Springs proposal to move Station WHMA to the Atlanta Urbanized Area,³ the Commission must explain what it means by "technical manipulation of the rules" and why WNNX's is not a "technical manipulation of the rules."

WNNX's Case Discussion is Incomplete and Adds Nothing of Interest

8) WNNX fails to discuss Mr. Small's argument that reliance upon *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd. 10352 (Alloc. Br. 1995) is clearly erroneous because that case concerned the relocation of a station from one community to another where both communities were located outside of an urbanized area while the instant case concerns WNNX's proposal to relocate within the Atlanta Urbanized Area. *Petition*, at ¶ 8. A *Tuck* analysis is required when a station is to be moved into an urbanized area while *Headland, Alabama and Chattahoochee, Florida*, at ¶ 11, establishes rule that a *Tuck* analysis is also required when the proposal seeks to relocate to a community outside of an urbanized area, but adjacent to it, such that 50% or more of the urbanized area is covered. While WNNX cites the *Headland* case in its *Opposition*, at ¶ 8, WNNX fails to discuss Mr. Small's argument that *Headlands* is irrelevant to WNNX's proposal because WNNX proposes to move into, not adjacent to, the Atlanta Urbanized Area. Similarly, WNNX cites *Oraibi and Leipp, AZ*, 14 FCC Rcd. 13547 (1999), *Opposition*, at ¶ 8, but WNNX fails to address Mr.

³ WNNX even offered a deal for the Commission: grant the College Park proposal and WNNX would dismiss the then pending application for review concerning Sandy Springs.

Small's argument that the case is irrelevant because *Oraibi and Leipp, AZ* "concerns a proposed community located 45 miles from the central city, the area between the communities is sparsely populated, and the proposed community is not a part of the Flagstaff Urbanized Area. *Oraibi and Leipp, AZ*, 14 FCC Rcd. 13547 ¶ 4." *Petition*, ¶ 9. Moreover, WNNX's citation to *Mullins and Briarcliffe Acres, SC*, 14 FCC Rcd. 10516 (1999), *Opposition*, at ¶ 8, is not helpful because WNNX fails to respond to Mr. Small's argument that the case is irrelevant because the proposed community is located outside of the urbanized area, unlike the instant case, and that the case is not otherwise helpful because the case fails to explain how the identity of the providers of various municipal services, standing alone, conclusively bears upon a determination of whether two communities are interdependent.

9) WNNX recites the *MO&O*'s reliance upon *Ada, Newcastle and Watonga, Oklahoma*, 11 FCC Rcd. 16896 (1996), *Opposition*, at ¶ 9, for the proposition that the Commission has approved relocations where the population figure was 5.2%. *Opposition*, at ¶ 9. Once again, WNNX fails to discuss the fact that *Ada, Newcastle and Watonga, Oklahoma* is a case where the involved station was being relocated to an area which was outside of the urbanized area and thus does not apply to the instant proceeding which seeks to relocate to an area within the Atlanta Urbanized Area. *Ada, Newcastle and Watonga, Oklahoma*, ¶ 14. The Commission has stated that the required showing of interdependence increases as the distance from the Central City increases, conversely, the required showing of interdependence decreases as the distance to the Central City decreases. *Fay and Richard Tuck*, 3 FCC Rcd. 5374 ¶ 34 (FCC 1988); *Petition*, at ¶ 12. The proposed community in *Ada, Newcastle and Watonga, Oklahoma* is 15 miles from the Central City of Oklahoma City, *Ada, Newcastle and Watonga, Oklahoma*, ¶ 5, while College Park is adjacent to the City of Atlanta. Because the station in *Ada, Newcastle and Watonga, Oklahoma* is located in a sparsely settled area

located outside of the urbanized area and distant from the central city, the case does not assist instantly where WNNX proposes to move to a densely populated, urbanized, area adjacent to the Central City of Atlanta.

10) Much more pertinent is the Commission's decision in *Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd. 6580 (1991), *app. for rev dismissed*, 12 FCC Rcd. 8392 (1997), *app. for rev. dismissed* 13 FCC Rcd 2104 (1998) where the Commission denied a request to move Station WHMA into the Atlanta urbanized area. The fact that WNNX now proposes that Station WHMA be relocated to south of Atlanta, rather than north of Atlanta as was tried 10 years ago, does not mitigate the fact that College Park is part of the same urbanized area as the earlier proposed Sandy Springs.

The Critical Issue is Interdependence, Not Community Status

11) WNNX claims that "the administrative record before the Commission strongly evidences that College Park is an established community of over 20,000 residents with enough advertizing base to support a local radio station." *Opposition*, at ¶ 10. Of course, the question is not whether College Park is an established community, nor is the question whether there is a sufficient advertizing base to support a local station.⁴ WNNX's comments merely go to the question of whether College Park is a community for allocation purposes, an issue which Mr. Small does not challenge.

12) After it is determined that College Park is a community for allocation purposes, the critical question is the extent to which College Park is intertwined with the Central City of Atlanta.

⁴ The record does not contain any information on the proposed operating costs nor the projected advertizing revenues from College Park businesses and WNNX does not specify in the record where such information may be found. Thus, WNNX is incorrect when it states that the record supports the conclusion that sufficient College Park advertizing exists to support the relocated station.

Fay and Richard Tuck, 3 FCC Rcd. 5374 ¶ 34 (FCC 1988). WNNX's *Petition for Rulemaking* states the following which evidence College Park's interdependence with the Central City of Atlanta:

major employers located in the community and which employ primarily College Park residents include Hartsfield International Airport (one of the largest and busiest airports in the country), the Federal Aviation Administration's Southeastern Headquarters

Petition for Rulemaking, at 9.

a large number of workers (40%) actually commute from Atlanta and other nearby communities to College Park!

Petition for Rulemaking, at 10 (exclamation in original).

The City uses its taxing authority to collect, among others, a hotel/motel tax, flight equipment tax, and special district tax.

Petition for Rulemaking, at 11.

Although College Park does not have its own telephone book, the City has an independent listing in the government pages of the telephone book which is typical of many cities near Atlanta. . . . Two of the most visible signs of College Park's economic independence are the Hartsfield Airport and the City-owned and operated Convention Center College Park built and owns the FAA's office complex

Petition for Rulemaking, at 12.

College Park Is A Major Transportation Hub College Park is home to Hartsfield Airport and is a major transportation hub for the CSX railroad line and several interstate highways. The Airport is subject to the City's taxing authority and is therefore a major source of revenue to College Park. A large network of hotels and motels has developed within College Park to support both the Airport and the Convention Center.

Petition for Rulemaking, at 14 (underlining in original).

College Park has unique attributes, most notably the Convention Center and Hartsfield International Airport, which make it a thriving, self sustaining community that is beyond a doubt independent of Atlanta.

Petition for Rulemaking, at 15.

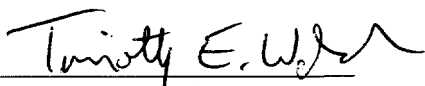
13) The list of factors provided in *Tuck* is not exhaustive. *Fay and Richard Tuck*, 3 FCC Rcd. 5374 ¶ 35. Because the critical examination focuses on the relationship between the Central

City of Atlanta and College Park, the Commission must explain, in order to rule in WNNX's favor, how the Central City of Atlanta's ownership 60% of College Park, how the Central City of Atlanta's "substantial employment" of the residents of College Park via the Airport, how the Central City of Atlanta's provision of various municipal services to more than 60% of the City of College Park, and how College Park's other urbanized relationships, as stated by WNNX itself, can be reconciled with a finding that College Park is not intertwined with Atlanta, bearing in mind that the close proximity of College Park to Atlanta necessarily means that a lower showing of interdependence is required before the Commission will attribute Atlanta's broadcast stations to College Park for purposes of the allocation analysis. WNNX's *Petition for Rulemaking* plainly states how important the City of Atlanta is to an analysis of this case. That relationship did not become less important merely because WNNX learned that the enormous, extremely busy Atlanta-Hartsfield Airport is owned by the City of Atlanta.

WHEREFORE, in view of the information presented herein and in the earlier submitted documents, it is respectfully submitted that reconsideration is warranted and that Mr. Small's proposal should be granted.

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CERTIFICATE OF SERVICE

I hereby certify that I have this 31st day of May 2001 served a copy of the foregoing REPLY TO OPPOSITION TO PETITION FOR RECONSIDERATION AND REQUEST FOR PROTECTION by First-Class United States mail, postage prepaid, upon the following:

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